83-2087

No.

In the Supreme Court of the United States

October Term, 1983

WALTER L. COOK,
Petitioner,

vs.

R. W. HARMON AND SONS, INC., AND THE KANSAS CITY, MISSOURI PUBLIC SCHOOL DISTRICT, DISTRICT #33,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT G. DUNCAN
(Counsel of Record)
2601 Kendallwood Parkway
Kansas City, Mo. 64119
(816) 455-2525
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

I

Does the defense of res judicata bar federal court litigation where the prior state court decision was on the issue of standing to sue and not upon the merits of the claim?

(a) Where state rules provide that involuntary dismissals are not on the merits does res judicata apply to judgments by dismissal?

II

In res judicata a defense to federal litigation where the state court's decision did not properly apply the controlling federal law on a federal issue?

(a) Has a state court decision on a federal question, in which the state court does not follow controlling federal authorities, afforded the Petitioner a full and fair opportunity to litigate the issue?

III

Does the anti-rehabilitation provision of the regulations implementing the rehabilitation act of 1973 apply to complaints made by third persons?

(a) And if so, may such third-person sue for a violation of such provision?

IV

Is a private corporation that operates school buses for handicapped students under a contract with a school dis-

trict, that is required by law to furnish transportation to such children, engaged in state action?

(a) Does a school bus driver who is responsible for the care and safety of handicapped passengers, and who is required by law to post a bond conditioned upon his faithful performance of his duties, and who may be subjected to personal liability, have a constitutionally protected property interest in the students' safety requiring due process?

(b) Where such a school bus driver was reprimanded and constructively fired because he made a complaint did he have a constitutionally protected liberty interest because the reprimand was placed in his personnel file and thus his freedom to secure other employment was diminished?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

No.

In the Supreme Court of the United States

October Term, 1983

WALTER L. COOK,
Petitioner,

vs.

R. W. HARMON AND SONS, INC., AND THE KANSAS CITY, MISSOURI PUBLIC SCHOOL DISTRICT, DISTRICT #33,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The United States District Court for the Western District of Missouri by Order dated October 25, 1983, not officially reported, sustained a motion for summary judgment in favor of the defendant-respondents. The contents of this order is annexed hereto as Exhibit A.

The district court, by Order dated November 8, 1983, not officially reported, denied plaintiff-petitioner's motion for reconsideration. The contents of this order is annexed hereto as Exhibit B.

The district court, by Order dated November 30, 1983, not officially reported, denied plaintiff-petitioner leave to proceed in forma pauperis. The contents of this order is annexed hereto as Exhibit C.

The United States Court of Appeals for the Eighth Circuit, by Order dated February 28, 1984, not officially reported, dismissed petitioner's appeal as being frivolous. This order is annexed hereto as Exhibit D.

The court of appeals, by Order dated March 21, 1984, not officially reported, denied reconsideration. This order is annexed hereto as Exhibit E.

Also attached hereto as Exhibits F and G, respectively, are the Orders entered in the Circuit Court of Jackson County, Missouri, dismissing Petitioner's petition therein as to each Respondent herein.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its Order dated February 28, 1984, dismissing Petitioner's appeal, and thereafter denied Petitioner's timely motion to reconsider by Order dated March 21, 1984. This petition for writ of certiorari is filed within ninety (90) days of that order and is therefore timely under the provisions of Title 28, United States Code, Section 2101(c), this matter involving the review of a civil action originally filed in the United States District Court for the Western District of Missouri.

This Court has jurisdiction to review the judgment below by a writ of certiorari, under the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution
Fourteenth Amendment

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 20, United States Code

Section 1401 (prior to 1983 amendment)

"Definitions"

. . .

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

. . .

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term

also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

. . .

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

. . ."

Title 28, United States Code

Section 1331—

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Title 29, United States Code

Section 794—

"No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS

Sec. 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

Section 794 a(a)(2)— . . .

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USCS Secs. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS Sec. 794.]

(b) In any action or proceeding to enforce or change a violation of a provision of this title [29 USCS Secs. 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Title 42, United States Code

Section 1983—

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 2000d—

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Code of Federal Regulations

Title 34

Section 100.7(e)

"(e) *Intimidatory or retaliatory acts prohibited*: No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing or judicial proceeding arising thereunder."

Section 104.4—

"(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from par-

ticipation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited* . . . .

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, . . ."

Section 104.6—

"(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part; . . ."

Section 104.7(b)—

"(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to post-secondary educational institutions."

Section 104.37

"(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extra-

curricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation. . ."

Section 104.61

"The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. . . ."

Missouri Revised Statutes (1979):

Section 162.700—

"1. The board of education of each school district in this state, except school districts which are part of a special school district, and the board of education of each special school district shall provide special educational services for handicapped children five years of age or more residing in the district, and may provide special educational services for handicapped children under the age of five years residing in the district. . . ."

Section 162.710

"The district responsible for furnishing special educational services shall provide necessary transportation for all handicapped children residing within the district, including transportation to and from contracted day classes, notwithstanding the provisions of Sections 162.621 and 167.231, R.S. Mo."

Section 167.231—

. . .

"1. Within all school districts the board of education shall provide transportation to and from school for all

pupils living more than three and one-half miles from school and may provide transportation for all pupils. State aid for transportation shall be paid as provided in section 163.161, RSMo., only on the basis of the cost of pupil transportation for those pupils living one mile or more from school. The board of education may provide transportation for pupils living less than one mile from school at the expense of the district and may prescribe reasonable rules and regulations as to eligibility of pupils for transportation. . . ."

Section 167.251—

"When transportation is provided by a district pursuant to law, the school board shall make all needful rules and regulations for the transportation of pupils and shall require from every person employed for that purpose, a reasonable bond conditioned upon the faithful discharge of his duties as prescribed by the board. . . ."

Section 304.060—

"1. The state board of education shall adopt and enforce regulations not inconsistent with law to cover the design and operation of all school buses used for the transportation of school children when owned and operated by any school district or privately owned and operated under contract with any school district in this state, and such regulations shall by reference be made a part of any such contract with a school district. The state board of education may adopt rules and regulations governing the use of other vehicles owned by a district or operated under contract with any school district in this state and used for the purpose of transporting school children; provided that such other vehicles shall not transport more than four

school children at any one time and the operator shall be licensed in accordance with section 302.070. Every school district, its officers and employees, and every person employed under contract by a school district shall be subject to such regulations. The state board of education shall cooperate with the state highway department and the state highway patrol in placing suitable warning signs at intervals on the highways of the state.

2. Any officer or employee of any school district who violates any of the regulations or fails to include obligation to comply with such regulations in any contract executed by him on behalf of a school district shall be guilty of misconduct and subject to removal from office or employment. Any person operating a school bus under contract with a school district who fails to comply with any such regulations shall be guilty of breach of contract and such contract shall be canceled after notice and hearing by the responsible officers of such school district."

Missouri Supreme Court Rules of Civil Procedure

Rule 67.03 (as amended 1973):

"A dismissal without prejudice permits the party to bring another civil action for the same cause, unless the civil action is otherwise barred. A dismissal with prejudice bars the assertion of the same cause of action or claim against the same party. Any voluntary dismissal other than one which the party is entitled to take without prejudice, and any involuntary dismissal other than one for lack of jurisdiction, for prematurity of action, for improper venue or for failure to substitute a party for a decedent shall be with prejudice unless the court in its order for dismissal shall otherwise specify."

STATEMENT OF THE CASE

The Respondent R. W. Harmon and Sons, Inc. (hereinafter referred to as Harmon) is a private corporation and had a contract with the Respondent Kansas City, Missouri, Public School District, a political subdivision of the State of Missouri (hereinafter referred to as School District), by the terms of which Harmon was to operate school transportation vehicles and transport handicapped students to and from schools operated by the School District. The Petitioner was a Special Education School Bus driver for Harmon, and as such was responsible for the care and safety of the students he transported. For several years Petitioner drove a van transporting such students but at the beginning of the 1980 school year he was assigned to transport these students in a 35-passenger school bus with no seat belts and no special wheel chair equipment or lifts, and with a high step up into the bus. At least four of the students Petitioner regularly transported had severe mobility impairments, and soon after school started two of these students had been injured during entrance or exit from this bus. Petitioner complained to his superior regarding the dangers to the safety and welfare of the students, that he was facing the possibility of personal liability, and that the conditions of transportation violated federal regulations pertaining to handicapped persons. Nothing was done.

On September 24, 1980, Petitioner made a telephone complaint to the Special Education Department of the Respondent School District regarding the lack of accessibility to, and the lack of proper equipment on the bus he was required by Harmon to use, and about the previous injuries and the safety hazards. This complaint was not

acted upon, but instead Harmon was notified by the School District of Petitioner's complaint. Harmon, on that date, wrote and delivered to Petitioner a letter, a copy of which was placed in his personnel file, notifying Petitioner that if he continued "to interfere in company business" he would be immediately terminated.

On September 26, 1980, Petitioner submitted a written resignation to Harmon, because he felt he could not continue to be employed under these conditions. Petitioner claimed below that he was constructively discharged.

On January 27, 1981, Petitioner filed a complaint with the Office of Civil Rights of the Department of Education (hereinafter referred to as OCR), claiming a discrimination against the students he had transported, and that unlawful retaliation had been taken against him by Harmon's letter of reprimand. The School District agreed to take certain corrective action including requesting Harmon to remove the reprimand from Petitioner's file, and the adoption of a grievance procedure as is required by the regulations.

On February 16, 1982, Petitioner filed a Petition for Damages and Equitable Relief in the Circuit Court of Jackson County, Missouri, against Harmon, alleging that he was unlawfully discharged and that Harmon had breached its contract with the School District by discriminating against the students and that he was a third party beneficiary of that contract. Petitioner sought reinstatement on the job as well as actual and punitive damages. After Harmon filed a motion to dismiss Petitioner was allowed to amend his Petition, which he did adding the School District as a party defendant, and alleging that Petitioner had the basic and primary responsibility for the

safety and welfare of the handicapped students he transported, and therefore he had a compelling and vested interest and had the right to file complaints on the students' behalf. It further alleged a due process violation.

Both Harmon and School District filed motions to dismiss primarily attacking Petitioner's standing to sue.

The state circuit court sustained the motions to dismiss finding that the Petitioner had no standing to sue. Copies of the two orders are annexed hereto as Exhibits F and G. Petitioner did not appeal from that order. After the order, but before it became a final judgment, Petitioner instituted suit in the United States District Court for the Western District of Missouri against Harmon and the School District alleging wrongful constructive discharge and a violation of procedural due process rights.

Jurisdiction in the district court was grounded on Section 504 of the Rehabilitation Act of 1973 as amended (Title 29, United States Code, Section 794), The Education For All Handicapped Children Act of 1975 (Title 20, United States Code, Section 1401), Title 42, United States Code, 2000d, and Title 28, United States Code 1331, the cause involving a federal question.

Petitioner and the Respondents filed motions for summary judgment and the district court sustained and entered a summary judgment for both Respondents on the basis of res judicata.

Petitioner filed a timely appeal but the United States Court of Appeals for the Eighth Circuit dismissed his appeal, without opinion, as frivolous.

ARGUMENT

REASONS RELIED ON FOR ALLOWANCE FOR WRIT

Petitioner respectfully suggests that the issues presented herein are important questions of federal law which should be settled by this Court. This cause involves the application by a United States District Court of the doctrine of res judicata in dismissing federal litigation under the anti-retaliation provisions of Section 504 of the Rehabilitation Act of 1973 as amended (codified as 29 U.S.C. 794 and its implementary regulations, including 34 C.F.R. 100.7(e)), on the basis of a prior state court decision between the same parties on a similar cause of action where the state court dismissed the cause on the basis of lack of standing, which basis was not in conformity to controlling federal authority. In other words, where a state court, in ruling on a motion to dismiss alleging that the plaintiff does not have standing to sue, fails and refuses to follow controlling federal law, has such a ruling afforded that plaintiff a full and fair opportunity to litigate the merits of his or her claim, and should such a ruling be afforded preclusive effect so as to bar a subsequent federal action on a similar cause of action?

The Petitioner herein was the plaintiff in both the state and federal cases. He had been a special education school bus driver for R. W. Harmon and Sons, Inc. (hereinafter referred to as Harmon). Harmon was a private corporation that contracted with the Kansas City, Missouri, Public School District (hereinafter referred to as School District), to provide transportation for handicapped students to and from school. The School District was required by Missouri law to furnish such transportation to such students. See

Section 162.700, R.S. Mo. as amended 1977; Section 162.710, R.S. Mo., as amended 1974; and Section 167.231, R.S. Mo. as amended 1979. The Petitioner, as such a school bus driver, was responsible for the care and safety of the students while riding on and while entering or leaving the bus, and was, under Missouri law, required to post a bond conditioned upon his faithful discharge of his duties. See Section 167.251, R.S. Mo. 1979. Under that statute the School District board was required to adopt rules and regulations governing such transportation, and under Missouri law the School District received aid for such students and their transportation from the State of Missouri, and received substantial federal aid and assistance.

The Petitioner, who was himself handicapped from a spina bifida, at the beginning of the new school year was assigned a school bus, instead of a specially equipped van, to drive, and he made unsuccessful complaints to his superior, and then made complaints to the School District regarding the lack of safety equipment and the potential dangers to the students he was transporting. Two children had already been injured before his complaint was made. The School District did not initiate any investigation or other action other than to report to Harmon that Petitioner was complaining. Indeed, the School District did not have any type of grievance procedure for such complaints, although such a procedure was required by federal regulations.

Harmon then reprimanded Petitioner and ordered him to stop his complaints. Faced with this quandry, Petitioner resigned, claiming a constructive firing. Eventually a suit was filed by Petitioner in state court. The defendants in that action (the Respondents herein) filed motions to dismiss based primarily on a claim that Petitioner had no standing to sue. The state court, in dismissing the cause,

cited· *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D.C. Del. 1978), and found Petitioner had no standing. Further, the state court, citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974), held that Harmon was not engaged in state action. The state court also held that due process did not apply because Petitioner had no constitutionally protected interest.

Throughout the pleadings and briefs in that proceeding Petitioner, acting pro se, had cited to the state court the controlling federal regulations, including 34 C.F.R. 100.7(e), 34 C.F.R. 104.7(b) and 34 C.F.R. 104.61, and the case of *Ross v. Allen*, 515 F. Supp. 972 (D.C. N.Y. 1981), wherein a school psychologist was allowed to sue under the Rehabilitation Act of 1973 when she was terminated by a privately operated school for the handicapped after complaining to the city board of education about the suspension of a student at the school. The state court did not discuss these authorities in its orders dismissing the Petitioner's suit.

The case of *N.A.A.C.P. v. Wilmington Medical Center, Inc.* relied upon by the state court had been already reversed; see *N.A.A.C.P. v. Medical Center*, (3rd C.A. 1979) 599 F.2d 1247, and was not legal authority for the court's position. Indeed the Court of Appeals decision, reversing the district court, held that the N.A.A.C.P., obviously a third party, did have standing to sue under Section 504 and Title VI. The state court's reliance on *Jackson v. Metropolitan Edison Co.*, supra, was also misplaced. That case involved a suit versus a private utility company for the termination of services because of non-payment. There the dismissal below was affirmed because the utility company, although regulated by the state, was not performing a public function so due process did not apply. It was

said, however, therein, loc cit 352, "We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the state." In our present case the School District was required by law to transport the handicapped children and Harmon was performing that function under contract with the School District and was governed by the School District's rules and regulations as well as by state law. See Section 304.060, R.S. Mo., as amended 1977. In *Jackson* state law did not require the furnishing of utility service.

Not only did the state court not reach the merits of Petitioner's claim of retaliation and denial of due process, but it decided the issue of standing on the authority of a case that had been reversed and held, upon appeal, exactly the opposite. Petitioner did have standing to raise the denial of due process. Harmon (and the School District) was engaged in state action. Petitioner had the responsibility for the care and safety of the handicapped students, he was required by law to post a bond conditioned upon the faithful discharge of his duties, he stood the risk of personal liability upon the injury of a student. Under Missouri law if Harmon did not comply with the School Board's rules and regulations its contract could be cancelled and this would, no doubt, result in Petitioner's loss of employment. It was to Petitioner's definite monetary interest to see that the students were transported safely. See Section 304.060, R.S. Mo., as amended 1977. As was said in *Smith v. Organization of Foster Families*, 431 U.S. 816, 53 L.E.2d 14, 97 S.Ct. 2094 (1977), in determining if a constitutionally protected interest exists, it is not weight of the interest that is to be looked at, it is the nature of the interest at stake that controls. It was also pointed out there that children usually lack the capacity to protect their own interest. Obviously the Petitioner, the driver of the bus, would be in the best position to know whether or not the

bus was safe for the transportation of the handicapped children. He had a personal monetary interest, a statutory and employment contract duty, as well as a humane interest in the safety of the children. He had a property interest. Harmon, because of Petitioner's complaint, placed a reprimand in his personnel file and this indeed imposed on him a stigma and a disability that affected or might even foreclose his freedom to other employment opportunities. Thus Petitioner had a protected liberty interest. See *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

It is clear that a private action does lie for Section 504 violations. *Consolidated Rail Corporation v. Darrone,* 104 S.Ct. 1248 (1984); *Miener v. State of Missouri,* (8th C.A. 1982) 673 F.2d 969, cert. denied 102 S.Ct. 215, 74 L.Ed.2d 171.

34 C.F.R. Section 104.61 incorporates 34 C.F.R. 100.7(e) as a rule and regulation implementing Section 504 of the Rehabilitation Act of 1973 (codified as 29 U.S.C. 794). That regulation prohibits a federal assistance recipient or any other person from intimidating, threatening, coercing or discriminating against "any individual . . . because he has made a complaint . . . The identity of complainants shall be kept confidential except to the extent necessary to carry out the purpose of this part . . . it would appear to be idiotic to say that this anti-retaliation prohibition only protects a handicapped person who is being discriminated against and about whom the complaint is made. How could his or her name possibly be kept confidential. Many of the handicapped persons protected by the Act are mentally retarded, otherwise suffer from developmental disabilities, or are so physically handicapped that they might not have the ability or faculties to complain even if they were aware they were being discriminated against.

If this anti-retaliation prohibition does apply to a third party complainant, then would such third person not have a remedy for a violation thereof?

The School District, being a federal assistance recipient, was required to establish a grievance procedure which incorporates appropriate due process standards under 34 C.F.R. 104.7(b). The School District did not have such a procedure and instead participated in the retaliation against Petitioner by "snitching" on him to Harmon.

The above issues are important issues of federal law which should be settled by this Court. It appears there is a divergence of opinions by the various Courts of Appeal. For instance in *N.A.A.C.P. v. Medical Center,* supra, the Third Circuit allowed the N.A.A.C.P., a third party, to sue for alleged Section 504 violations. In *Hoyt v. St. Mary's Rehabilitation Center,* (8th C.A. 1983) 711 F.2d 864, a third person was held not to have standing to sue, even though the Court of Appeals for the Eighth Circuit, held therein that retaliation against persons who make complaints under Section 504 is actionable.

This case also involves a substantial question involving the application of the doctrine of res judicata. The District Court below held that the state court judgment was a bar to the Petitioner's federal court action for a violation of Section 504 and for denial of due process. The Court of Appeals agreed and dismissed Petitioner's appeal as being frivolous.

Res judicata and its companion doctrine of collateral estoppel has been the subject of numerous decisions of this and other courts. In *Montana v. United States,* 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), the two doctrines were discussed at length. There it was said, loc cit 153, that under the doctrine of res judicata a final

judgment on the merits bars further claims by the parties or their privies based on the same cause of action. It was also said that the doctrine of collateral estoppel prevents relitigation of issues where the party had a full and fair opportunity to litigate the matter. At page 159, it was said, "It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable." In *Commissioner v. Sunnen,* 333 U.S. 591, 92 L.Ed. 898, 68 S.Ct. 715, it was said that modifications of controlling legal principles could render a previous determination inconsistent with prevailing doctrines, as thus did not apply collateral estoppel to a determination of the status of income from a contract made in an earlier tax year.

In *Montana,* supra, loc cit 163, footnote 11, it was said, "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." In *Kremer v. Chemical Construction Co.,* 456 U.S. 461, 102 S.Ct. 1883 (1982), it was said that a prior judgment does not have preclusive effect if it is constitutionally infirm because of a denial of due process. At footnote 22 therein it was said that the requirement of a full and fair opportunity to litigate a claim or issue applies also to res judicata or claim preclusion. See also *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980). The Missouri decisions also require a full and fair opportunity as a prerequisite to the application of collateral estoppel. See *Peoples-Home Life Ins. Co. v. Haake,* (Mo. App. 1980) 604 S.W.2d 1, 8. That case also requires that the judgment be on the merits.

The dismissal by the state court was on the basis of lack of standing. Missouri Supreme Court Rule 67.03 authorizing the dismissal of civil actions provides that involuntary dismissals for lack of jurisdiction shall be without

prejudice. In *Peoples-Home Life Ins.*, supra, it was held that dismissals pursuant to Rule 67.03 are not adjudications of issues upon the merits, saying, loc cit 9:

> "Thus, our Supreme Court has overruled *Max v. Spaeth* (349 S.W.2d 1, Mo. 1961), and the line of cases derivative therefrom holding that dismissal pursuant to Rule 67.03 is tantamount to an adjudication of issues upon the merits."

Former Rule 67.03, prior to its amendment in 1973, did provide that a dismissal with prejudice operates as an adjudication upon the merits. See *Denny v. Mathieu,* (Mo. banc 1970) 452 S.W.2d 114.

This Court has held that state rules of res judicata are to be applied. *Migra v. Warren City School District Board of Education,* 104 S.Ct. 892 (1984). Before res judicata applies the judgment must be on the merits. See *Peoples-Home v. Haake,* supra; *Montana v. United States,* supra. The judgment in the state court below was entered upon the sustaining of a motion to dismiss and not after a hearing upon the merits. The state court, in dismissing the Petitioner's cause of action without a hearing on the merits, applied inapplicable and overruled authorities. In *Old Grantian Co. v. William Grant and Sons Ltd.,* (Ct. of Cust. and Pat. App. 1966) 361 F.2d 1018, 1021, it was held that a summary judgment based on res judicata should be denied if there is a genuine issue of material fact as to the validity of the prior judgment, its scope and coverage, privity, or whether it was on the merits so that it is controlling in the case at bar. The District Court below sustained the Respondent's motion for summary judgment on the basis of res judicata.

This Court has held that an arbitration award should not be used as the basis for a claim of res judicata or

collateral estoppel because, among other reasons, the arbitrator may not have the expertise to resolve the complex legal questions that arise in a 42 U.S.C. 1983 case. *McDonald v. City of West Branch, Mich.* (Cause #83-219, decided April 18, 1984). That reason applies here to the decision of the state court judge in dismissing Petitioner's state court proceeding.

CERTIFICATE OF SERVICE

Three copies of the foregoing petition were mailed, first class mail postage prepaid, to Jack L. Whitacre and Robert B. Terry, Spencer, Fane, Britt and Brown, 1000 Power and Light Bldg., 106 W. 14th Street, Kansas City, Missouri 64105, Attorneys for Respondents, this 11th day of June, 1984.

ROBERT G. DUNCAN

APPENDIX

EXHIBIT A

(Filed October 25, 1983)

No. 82-0757-CV-W-4

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WALTER L. COOK,
Plaintiff,

vs.

R. W. HARMON & SONS, INC., et al.,
Defendants.

ORDER

On February 18, 1982, plaintiff filed suit against defendants in state court alleging violations of § 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964. Essentially, plaintiff is attempting to assert the rights of handicapped school children who rode a bus owned by defendant Harmon and driven by plaintiff. Plaintiff alleges the bus was not properly equipped to meet the childrens' special needs and, when plaintiff complained to the defendant school district authorities, his employer, Harmon, "retaliated" by writing him a letter demanding he cease to intervene or be terminated. Plaintiff quit and alleges he was thereby constructively discharged.

The Circuit Court of Jackson County, Missouri, dismissed his petition with prejudice after plaintiff's unsuc-

cessful attempts to amend, for failure to state a claim upon which relief could be granted. Plaintiff did not appeal this determination and it became a final judgment on September 11, 1982. *See,* Missouri Rules of Civil Procedure 67.03.

On September 10, 1982, plaintiff filed the present action alleging the same violations based on the same facts naming the same defendants. Defendants have moved for summary judgment on the ground, *inter alia,* of res judicata. Plaintiff filed a cross-motion for summary judgment. Defendants' motion will be granted.

In contemplating a motion for summary judgment under Rule 56, Fed.R.Civ.P., this Court is mindful of the strict standards imposed by the Eighth Circuit Court of Appeals. In *Klinge v. Lutheran Charities Ass'n of St. Louis,* 523 F.2d 56 (8th Cir. 1975), the Court stated that such a motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences obtainable from the material before the Court. In *Butler v. MFA Life Ins. Co.,* 591 F.2d 448 (8th Cir. 1979), the Court held that summary judgment should not be granted unless the moving party has established his right to judgment with such clarity that no room for controversy remains and has demonstrated that the nonmoving party is not entitled to recover under any discernible circumstances. It is well settled that a defense of res judicata may be appropriately raised by a motion for summary judgment. *See,* 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 2735 at 427 (1983). In this case, it is not only appropriate to raise but it is appropriate to grant summary judgment.

State courts, being of general jurisdiction, are competent to hear claims brought under the Rehabilitation

Act and other federal statutes upon which plaintiff relies. See, e.g., *Nelson v. Tuscarora Intermediate Unit No. II*, 421 A.2d 1234 (Comm. Ct. Pa. 1981) and *Silverstein v. Sisters of Charity*, 614 P.2d 891 (Colo. App. 1979). The state court rendered a decision adverse to plaintiff which he did not appeal. Therefore, because the requirements of the res judicata doctrine are met, plaintiff cannot now relitigate in a federal forum the same action. *Bradford v. Bronner*, 665 F.2d 680, 682 (5th Cir. 1982).

When the parties and the cause of action litigated are the same in both forums, res judicata bars relitigation. *Swope v. General Motors Corp.*, 445 F.Supp. 1222, 1230 (W.D. Mo. 1978). Here, the identical facts give rise to the identical cause of action brought by the same plaintiff against the same defendants. Therefore, the decision of the Circuit Court in the prior suit is res judicata as to these claims. *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1236 (2d Cir. 1977); *Harvey v. Pomroy*, 535 F.Supp. 78, 82 (D. Mont. 1982).

Because of the Court's ruling herein, plaintiff's "cross motion for summary judgment" and all other motions will be denied as moot. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and this case is dismissed with prejudice; and it is further

ORDERED that all other pending motions are denied as moot.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: October 25, 1983

EXHIBIT B

(Filed November 8, 1983)

No. 82-0757-CV-W-4

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WALTER L. COOK,
Plaintiff,

vs.

R.W. HARMON & SONS, INC., et al.,
Defendants.

ORDER

Plaintiff has moved the Court to reconsider its order of October 25, 1983 granting summary judgment and dismissing this action. In support, plaintiff suggests the Court erred in ruling plaintiff's claims were res judicata having been considered in the Jackson County Circuit Court and that plaintiff has a meritorious claim.

While it is true the federal court would be an appropriate forum for plaintiff's action, it is not, by statute or case law, the only appropriate forum. Plaintiff has not cited, and the Court cannot find, any authority to support plaintiff's contention that the federal court has exclusive jurisdiction over a purported claim under the Rehabilitation Act of 1973. And absent an express reservation of jurisdiction to the federal court, any court of general jurisdiction would be competent to hear the claim. It was plaintiff's choice to proceed in state court.

As to plaintiff's second contention that plaintiff had a meritorious claim, it is axiomatic that this Court will not sit as an appeals court from state circuit court decisions. Plaintiff's remedy would have been to appeal to the Missouri Court of Appeals; not to file anew in this court. Accordingly, it is hereby

ORDERED that plaintiff's motion to reconsider is granted; however, the ruling contained in this Court's order of October 25, 1983 is affirmed and this case remains dismissed with prejudice.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: November 8, 1983

EXHIBIT C

(Filed November 30, 1983)

No. 82-0757-CV-W-4

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WALTER L. COOK,
Plaintiff,

vs.

R.W. HARMON & SONS, INC., et al.,
Defendants.

ORDER

Plaintiff, pro se, has filed yet another motion for the Court to reverse its judgment that dismissed this case. The arguments now advanced are no more persuasive than plaintiff's earlier endeavors. The Court's ruling will be affirmed.

Plaintiff attempts to argue that *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982) vests the federal courts with exclusive jurisdiction to hear plaintiff's federal claims. There is absolutely nothing in that case to support plaintiff's conclusion. Putting plaintiff's quotation from the case in context, the Eighth Circuit held that once a federal cause of action exists, if the statute creating the action does not spell out damage relief then "federal courts may use any available remedy to make good the wrong." Such is not the case here.

Likewise, plaintiff's attempted reliance on *FDIC v. First Mortgage Investors*, 485 F.Supp. 445 (E.D. Wisc. 1980) is unavailing. That case involved the unique circumstances of the FDIC intervening on behalf of a bank to collect a debt. In the state court litigation the FDIC moved for summary judgment based on federal statutory grounds. The state court, without elaboration, denied the motion finding there were issues of fact remaining. The FDIC then removed the action to federal district court and renewed the statutory basis for summary judgment. The district court ruled that while the general rule was not to reconsider issues previously decided, there were good reasons for reevaluating prior rulings to take into account changed circumstances. The Court reasoned that the state court had not entered a final judgment (unlike here) and that the state court had only given preliminary and scant attention to the federal question (unlike here). *FDIC* is therefore easily distinguished from this case and provides absolutely no basis for this Court not giving res judicata effect to the state court's decision.

Plaintiff has also suggested that the statutory provisions of the Education For All Handicapped Children Act (20 U.S.C. § 1401 et seq) somehow by implication vests federal courts with exclusive jurisdiction in this case. Plaintiff is clearly wrong. The Education For Handicapped Children Act legislatively created educational rights and opportunities for handicapped children. Those rights can be enforced only by the child's parent or guardian. 20 U.S.C. § 1415(b)(1). Further, that very statute specifically provides that a civil action may be brought in any *state or federal* court. 20 U.S.C. § 1415(e)(2). Section 1415(e)(4), cited by plaintiff, in no way gives federal courts exclusive jurisdiction; it merely allows a federal forum be used without regard to the amount in controversy.

The Court is firmly convinced that plaintiff had the choice to bring his action in state court and that that court was competent to render its decision dismissing the claim for lack of standing. Having received a judgment with which plaintiff disagrees, he seeks to relitigate the matter in this Court. The doctrine of res judicata demands otherwise. There is substantial case support for the Court's conclusion. *See, e.g.*, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §§ 4468-4471 (1981).

Also filed is plaintiff's application for leave to appeal in forma pauperis, for the continued appointment of legal counsel on appeal and a notice of appeal. Federal Rule of Appellate Procedure 24(a) requires the party seeking an appeal to provide a statement of the issues he intends to present. Plaintiff's motion contains no such statement so the Court has reviewed the entire record. Upon such review, the Court is satisfied an appeal would be frivolous and therefore not taken in good faith. 28 U.S.C. § 1915(a). Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate judgment is denied and this case remains dismissed with prejudice; and it is further

ORDERED that plaintiff's motion to appeal in forma pauperis is denied.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: November 30, 1983

EXHIBIT D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

84-1008-WM

Walter L. Cook,
Appellant,

vs.

R. W. Harmon & Sons, Inc., and The Kansas City (#33), Missouri Public School District,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

After reviewing the record of the United States District Court for the Western District of Missouri and consideration of appellant's response to this Court's show cause order,

It is ordered that this appeal be, and it is hereby, dismissed as frivolous.

February 28, 1984

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

84-1008-WM.

WALTER L. COOK,
Appellant,

VS.

R. W. HARMON & SONS, INC., AND THE KANSAS CITY (#33), MISSOURI PUBLIC SCHOOL DISTRICT,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

Appellant's motion for reconsideration filed in the above matter has been considered by the Court and is hereby denied.

March 21, 1984

EXHIBIT F

Case No. CV82-03002

Civil E

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

WALTER L. COOK,
Plaintiff,

vs.

R. W. HARMON & SONS, INC. and THE KANSAS CITY, MISSOURI PUBLIC SCHOOL DISTRICT NO. 33,
Defendants.

ORDER

The court this day takes up for consideration defendant Harmon's motion to dismiss.

In his supplemental petition, plaintiff seeks to recover from defendant Harmon for a violation of Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973 and the due process and equal protection clauses of the Fourteenth Amendment.

As stated in the Order of April 27, 1982, plaintiff fails to allege that he is a member of the class of persons Congress intended to protect by either act. *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1978).

In addition, plaintiff's termination is not subject to judicial scrutiny under the Fourteenth Amendment for the reason that an action by a private corporation engaged in

the business of transporting school children does not constitute state action. While it may be argued that defendant Harmon is providing services affected with a public interest, the United States Supreme Court has rejected the broad principle that all businesses affected with the public interest are state actors. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974).

It follows that plaintiff's supplemental petition fails to state a claim against defendant Harmon upon which relief can be granted. Accordingly, defendant Harmon's motion to dismiss is sustained, and defendant Harmon is dismissed as a party to this action at plaintiff's costs.

Defendant Kansas City School District is hereby granted an extension until July 26, 1982, in which to respond to plaintiff's supplemental petition.

/s/ Timothy D. O'Leary
Timothy D. O'Leary

Jul 9 1982

EXHIBIT G

CV82-3002

CIVIL E

IN THE

CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

WALTER COOK,
Plaintiff,

vs.

R. W. HARMON & SONS, INC.,
Defendant.

ORDER

The Court this day takes up for consideration defendant School District's motion to dismiss.

The School District suggests that plaintiff's supplemental petition fails to state a claim upon which relief can be granted. Therefore the School District admits for the purposes of the motion, the truth of all facts properly pleaded in the supplemental petition. *Schnabel v. Taft Broadcasting Company, Inc.*, 525 S.W.2d 819 (Mo. App. 1975).

Plaintiff alleges that the School District violated Title VI of the Civil Rights Act of 1964, and the Rehabilitation Act of 1973. Plaintiff, however, fails to allege that he is a member of the class of persons Congress intended to protect, and therefore does not state a cause of action against the School District for a violation of either Act. *N.A.A.C.P. v. Wilminton Medical Center, Inc.*, 453 F. Supp. 280 (D.Del.1978)

Plaintiff further alleges that the School District denied him equal protection of the law by means of R.W. Harmon & Son's Inc.'s retaliatory letter resulting in plain-

tiff's discharge. The action by R. W. Harmon and Son's Inc., a private corporation engaged in the business of transporting school children, does not constitute state action and therefore is not a violation of the equal protection clause of the Fourteenth Amendment. See *Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (1974). In addition, plaintiff has not alleged an invidious discrimination without which there can be no violation of equal protection. *Mobile v. Bolden,* 100 S. Ct. 1490 (1980).

Plaintiff's final claim is that the School District denied him due process of law in that it failed to process or consider plaintiff's complaint concerning the inaccessible unsafe conditions for the handicapped student passengers of the school bus which plaintiff drove. A school bus driver does not have a constitutionally protected liberty or property interest in the safety of his passengers for the reason that a third party custodian does not acquire constitutional rights in another's child. *Smith v. Organization of Foster Families for E. and Reform,* 431 U.S. 816 (1977); *Bennett v. Jeffreys,* 40 N.Y.2d 543, 552 N.2 (1976). It follows that since plaintiff has no interest in the children which is protected by due process, a review of plaintiff's complaint by the School District is not constitutionally due. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972).

Accordingly, the School District's motion to dismiss plaintiff's supplemental petition is SUSTAINED. Plaintiff's supplemental petition is dismissed with prejudice at plaintiff's costs.

/s/ Timothy D. O'Leary
Judge Timothy D. O'Leary

DATE:

Copies mailed to:
Walter L. Cook
Jack L. Whitacre
GLADYS TYREE, Clerk